

### **3.01 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW**

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

### **3.02        USE OF NOTES**

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

### **3.03        WHAT IS EVIDENCE**

The evidence from which you are to decide what the facts are consists of:

1.     the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2.     the exhibits which have been received into evidence; and
3.     any facts to which all the lawyers have agreed or stipulated.

### **3.05 WHAT IS NOT EVIDENCE**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony has been received only for a limited purpose; where I have given a limiting instruction,

you must follow it.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

### **3.06 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies “I saw Joe break the glass”. Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies “I saw Joe holding the glass before I left the room. No one else was in it. When I returned, the broken glass was lying at Joe’s feet.” You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

### **3.07 CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

### **3.08 OPINION EVIDENCE -- EXPERT WITNESSES**

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.



## **ALL PERSONS EQUAL BEFORE THE LAW - INDIVIDUALS**

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

## **5.01 BURDEN OF PROOF - PREPONDERANCE OF THE EVIDENCE**

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. This means that if you conclude that the weight of the evidence on a claim is even, you must find for the defendants. If you conclude that the weight of the evidence favors the plaintiff, even slightly, you must find for him.

You should base your decision on all of the evidence, regardless of which party presented it.

### **3.12 TWO OR MORE PARTIES - DIFFERENT LEGAL RIGHTS**

You should decide the case as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

## **STATUTE INVOLVED**

Plaintiff's claims alleging that defendants violated rights guaranteed by the Constitution are brought under a federal statute, Section 1983 of Title 42 of the United States Code, which states:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In this case, plaintiff alleges that each of the defendants as state employees caused him to be deprived of his constitutional right to liberty under the Fourteenth Amendment to the U.S. Constitution.

Mr. Rhodes has the burden to establish, by a preponderance of the evidence, the following elements in order to prevail:

First: That a defendant performed acts which operated to deprive the plaintiff of one or more of his federal Constitutional rights, as defined and explained in these instructions.

Second: That a defendant then and there acted under color of the

authority of the State of California.

Third: That a defendant's acts were the proximate cause of damages sustained by plaintiff.

## **EXCESSIVE FORCE - ELEMENTS AND BURDEN OF PROOF**

Under the Fourteenth Amendment, a pretrial detainee's liberty rights are violated if he is subjected to treatment that amounts to punishment without a prior adjudication of guilt. In order for Mr. Rhodes to show that defendants Dore and Hayes used excessive and unnecessary force amounting to punishment, he must prove, by a preponderance of the evidence,

1. some harm, that
2. resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
3. objectively unreasonable in light of the facts and circumstances of the time.

Some of the things you may want to consider in determining whether a defendant used excessive force are:

1. the extent of the injury suffered;
2. the need for the application of force;
3. the relationship between the need and the amount of force used;
4. the threat reasonably perceived by defendants Dore and Hayes,

and

5. any efforts made to temper the severity of a forceful response.

## **LEGITIMATE USE OF FORCE BY CORRECTIONAL PERSONNEL**

Not every push or shove, even if it may later seem unnecessary, violates a pretrial detainee's constitutional rights. Law enforcement officers have the right to use reasonable force and take appropriate action to ensure the safety of the inmates and correctional personnel and to prevent escape or unauthorized entry.



## **INAPPLICABILITY OF HINDSIGHT**

You should not judge the conduct of Deputies Dore or Hayes on the basis of hindsight. Their conduct must be evaluated from the perspective of a reasonable officer on the basis of the facts and circumstances confronting them at the time of the incident.

## **SECTION 1983 LIABILITY**

Negligence is the failure to use reasonable care. Negligence is not a sufficient basis for a constitutional violation. If you find that a defendant was negligent in his duties, you may not find him liable on plaintiff's claim of deprivation of federal constitutional rights. To find a defendant liable, plaintiff must prove by a preponderance of the evidence that the defendant intentionally violated plaintiff's rights or acted with reckless disregard of plaintiff's rights. You may infer whether a defendant acted intentionally or with reckless disregard.

## **UNDER COLOR OF LAW -- SECOND ELEMENT OF SECTION 1983 CLAIM**

The parties to this lawsuit have agreed that at the time of the January 7, 1996 incident, the defendants were acting under color of state law as officials of the County of Alameda. Therefore, the second element of Mr. Rhodes Section 1983 claim is satisfied.

## **PROXIMATE CAUSE -- THIRD ELEMENT OF SECTION 1983 CLAIM**

The third element of Mr. Rhodes' claim is causation. The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm.

## **LIABILITY**

If you determine that either of the defendants deprived Mr. Rhodes of his constitutionally protected rights, your verdict will be in favor of plaintiff against such defendant, and you will go on to consider the damages to which plaintiff is entitled. If you determine that a defendant did not deprive Mr. Rhodes of his constitutional rights, your verdict will be in favor of that defendant. You may return a verdict in favor of plaintiff against one or both defendants, depending on your assessment of the evidence.

## **DAMAGES FOR DEPRIVATION OF CIVIL RIGHTS**

If you find for the plaintiff against any defendant, you must determine the plaintiff's damages. Mr. Rhodes has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for the deprivation of civil rights proximately caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The mental, physical, emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

Damages to compensate for the violation of constitutional rights are difficult to measure. In attempting to determine a dollar amount of any damages, you are certainly entitled to consider any pain, suffering or mental anguish that plaintiff has experienced as a result of one or both defendants' conduct.

You are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence. But damages must not be based on

speculation or sympathy. They must only be based on the evidence presented at trial.

## **PUNITIVE DAMAGES**

If you find for Mr. Rhodes, and if you award compensatory damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter that defendant and others from committing similar acts in the future.

Mr. Rhodes has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find by a preponderance of the evidence that a defendant's conduct was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party.

You may award punitive damages against one of the defendants and



not the other, and may award different amounts against the defendants.

## **ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE**

I have given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. Even though I have instructed you on various subjects you must not treat the instructions as indicating my opinion on how you should decide any issue in the case or as to which party is entitled to your verdict.

## **JURY NOT TO TAKE CUE FROM JUDGE**

I have not intended by anything I have said or done, or by any questions that I have asked, to suggest how you should decide any questions of fact, or that I believe or disbelieve any witness.

If anything I have done or said has seemed so to indicate, you must disregard it and form your own opinion.

## **COMMUNICATION WITH COURT**

If it becomes necessary to communicate with me during deliberations, you may send a folded note through the marshal or clerk, signed by a juror. Do not disclose the content of your note to the marshal or clerk.

Do not communicate with the court about the case except by a signed note. I will only communicate with you regarding the case in writing or in open court.

Do not disclose any vote count in any note to the court.

## **DUTY TO DELIBERATE**

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

## **RETURN OF VERDICT**

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form and advise the marshal in whose charge you will be that you have reached a verdict.